Supreme Court, U.S.
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No.

In the Supreme Court of the United States

PHILLIP L. KEPHART,

Respondent,

v.

BRIAN BELLEQUE, Superintendent,
Oregon State Penitentiary,

Petitioner.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, Kephart, an inmate imprisoned under state court judgments, was transferred from a state correctional institution to a privately-run out-of-state facility. When he finally filed a federal habeas petition, it was filed too late. Kephart claimed, however, that he was entitled to equitably toll part of the time that he spent in the out-of-state prison facility because the law library there was inadequate. Although the district court rejected that claim, the Court of Appeals for the Ninth Circuit disagreed and reversed, ordering that Kephart is entitled to an evidentiary hearing on his equitable tolling claim. Specifically, the court held that Kephart's allegations and submissions should be treated as *pro se* ones, even though he had been appointed counsel who had submitted additional materials in support of the equitable tolling claim. The court also held that Kephart was entitled to an evidentiary hearing on equitable tolling even though he provided no specifics about his use of the out-of-state prison law library. In addition, the court determined that Kephart's allegations were sufficient to show that he diligently pursued his rights even though he claimed only that he used the law library on occasion and that it lacked materials regarding federal law.

The questions presented in this case are:

1. When a habeas petitioner is represented by counsel who has had the opportunity to, and did, supplement the record and file additional materials regarding equitable tolling – the central issue before the district court -- and when the district court has reviewed those additional materials in rejecting that claim and denying relief, should the appellate court continue to view the petitioner's filings and evidentiary submissions as though he were proceeding *pro se* and apply the lenient standard of review that is granted to *pro se* pleadings?

2. Is equitable tolling available to permit the filing of an otherwise untimely petition seeking relief in federal habeas corpus or do the provisions of 28 U.S.C. § 2244(d) fully define and circumscribe the circumstances in which the Anti-Terrorism and Effective Death Penalty Act (AEDPA) one-year statute of limitations can be tolled or extended?

3. Assuming that equitable tolling applies in the AEDPA context, are conclusory allegations of diligence enough to warrant an evidentiary hearing on equitable tolling, or is more specificity required?

4. Again assuming that equitable tolling applies, is a showing of minimal effort a sufficient showing of diligence to warrant an evidentiary hearing on equitable tolling, or is more required?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the Superintendent of the Oregon State Penitentiary, respectfully prays that the Court issue a writ of certiorari to review the judgment and decision of the Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decisions of the Ninth Circuit Court of Appeals are reported, *Roy v. Lampert,* 455 F.3d 945, *amended* 465 F.3d 964 (9th Cir. 2006), and are in the appendix to this petition. (Pet. App. 14, 31).[1] The court issued its amended opinion after petitioner filed a petition for rehearing and suggestion for rehearing en banc. The magistrate judge's findings and recommendation, the district court's order adopting the findings and recommendation, and the district court's judgment dismissing this habeas corpus proceeding also are in the appendix. (Pet. App. 1, 7, 10).

JURISDICTION

Jurisdiction to review the judgment by writ of certiorari is conferred on the Court by 28 U.S.C. § 1254(1). The Ninth Circuit's initial decision was filed on July 12, 2006. *Roy v. Lampert,* 455 F.3d 945 (9th Cir. 2006). After obtaining an extension of time from that court, on August 23, 2006 petitioner timely filed his petition for panel rehearing and suggestion for rehearing en banc.[2] On September 22, 2006, the Ninth Circuit issued its amended opinion. *Roy,* 465 F.3d

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[1] The Ninth Circuit consolidated the appeal in this case with the appeal in *Roy v. Lampert. See Roy,* 465 F.3d at 967 (noting that the court consolidated the cases). Petitioner seeks the issuance of a writ of certiorari in *Kephart* only.

[2] That petition sought rehearing in Kephart's case only.

964. This Court later granted petitioner's application for an extension of time to file this petition for a writ of certiorari to and including January 22, 2007. This petition is being filed within the time granted by this Court.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(d) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

This is a habeas corpus proceeding brought by respondent Kephart, a prisoner in state custody, pursuant to 28 U.S.C. § 2254. The state and federal court proceedings in respondent's case are summarized below.

1. State trial and direct appeal

In the underlying state court proceedings (involving two separate criminal cases), respondent Kephart was convicted of four counts of second-degree assault, one count of first-degree assault, one count of attempted first-degree assault, and two counts of criminal mistreatment. *Roy,* 465 F.3d at 967. The judgments in those cases were entered on November 18, 1991. (E.R. 22, 25).[3] Kephart appealed, and the Oregon Court of Appeals affirmed his convictions. *Roy,* 465 F.3d at 968. He petitioned for review in the Oregon Supreme Court, and that court granted review and remanded to the Court of Appeals. *Id.* The state Court of Appeals affirmed Kephart's convictions on remand, and he did not seek review in the Oregon Supreme Court or file a petition for certiorari in this Court. *Id.* The appellate judgment issued, and Kephart's direct appeal became final, on December 8, 1995. *Id.*

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[3] E.R. refers to the excerpt of record filed with the Ninth Circuit Court of Appeals.

2. Transfer to Arizona facility

On February 7, 1996, Kephart was transferred to a privately-run correctional facility in Florence, Arizona. *Id.* He did not return to an Oregon institution until July 14, 1997. *Id.* It is the adequacy (or the alleged inadequacy) of the law library at the Arizona facility that is the centerpiece of Kephart's equitable tolling claim.

3. State post-conviction and appeal

While he was still at the Arizona facility, on May 6, 1997, Kephart filed a petition seeking state post-conviction relief. *Id.* In that petition (which was filed *pro se*), Kephart raised claims of inadequate assistance of his trial counsel and claims that the sentences imposed on him were excessive. (E.R. 37, 38). On October 6, 1998, the state trial court entered a judgment denying him relief in post-conviction. (E.R. 41-42).[4] The state Court of Appeals affirmed; the Oregon Supreme Court denied review; and the post-conviction appeal became final on October 23, 2000. *Roy,* 465 F.3d at 968.

4. Federal habeas corpus

a. District court

On May 14, 2001 – almost seven months after his state post-conviction case became final – Kephart filed a *pro se* petition seeking relief in habeas corpus. *Id.* In that petition, he raised claims of trial court error and of ineffective assistance of his trial and his appellate counsel on direct appeal. (E.R. 5, 7-12). With his petition Kephart filed a motion seeking the

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[4] The Ninth Circuit mistakenly stated that "state post-conviction relief was denied on July 17, 1997." *Roy,* 465 F.3d at 968. That mistake does not appear to bear significantly on the court's analysis.

appointment of counsel. (E.R. 186). That motion was denied without prejudice on September 13, 2001; Kephart filed a second motion asking that counsel be appointed, and that motion was granted on December 20, 2001. (E.R. 187). Kephart has been represented by counsel from that point on.

In the meantime, however, on October 12, 2001, Kephart filed a *pro se* response to the district court's order to show cause why his petition should not be dismissed on the ground that it was not timely. (E.R. 13). In that response, Kephart raised claims of statutory and equitable tolling.[5] Kephart conceded that he was "past the one year filing limit allowed by the AEDPA," but he "assert[ed] that his failure to file within the limitation is excusable because of an impediment or based on a standard of equitable tolling and, therefore, his petition should be accepted as timely filed." (E.R. 13). Specifically, he claimed that "his failure to file within the limitation period was completely beyond his control because knowledge of the filing requirement was not available to him until the limitation period had passed." (E.R. 13). He contended that, "when the State sent him to Arizona without access to current legal materials, [it] created an impediment to obtaining any knowledge about the limitation period of AEDPA [the Anti-Terrorism and Effective Death Penalty Act]." (E.R. 14). That "impediment was not removed until [Kephart] was returned to Oregon on 07/14/1997[.]" (E.R. 14). He also "assert[ed] that his lack of access to any information related to the AEDPA provides grounds for a late, but timely, filing under the principles of 'equitable tolling,'" and that "the complete impossibility of having knowledge

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[5] Because the Ninth Circuit disposed of this case on the basis of equitable tolling, it did "not address" the issue of statutory tolling. *Roy*, 465 F.3d at 972 n. 3. That issue is not before this Court.

about the procedural requirements of the AEDPA creates 'extraordinary circumstances' sufficient to allow filing." (E.R. 14) (citation omitted).

In his supporting affidavit, Kephart alleged that "[t]hroughout the process of exhausting [his] state appellate and post-conviction remedies, [he had] always planned to seek federal review of any constitutional violations if [he] did not gain relief in state court." (E.R. 17).

> While in Arizona, I had no access to current Oregon or federal law. The CCA [Corrections Corporation of America] library consisted of only three outdated legal books, which contained no information about the AEDPA. The Oregon Department of Corrections (OODOC) [*sic*] made no provision for sending any type of legal updates to the prisoners confined in Arizona. At no time during my imprisonment was there information provided by ODOC or CCA explaining any procedure to obtain legal information relevant to Oregon prisoners.
>
> Because of the insufficiency of the legal materials in the Arizona CCA prison, providing no legal materials which described the AEDPA, and no notice of the AEDPA, I was not able to gain knowledge of the one year limitation period for filing under the Act until I was returned to OSP from Arizona on 07/14/1997, slightly more than two months after I filed my state post-conviction petition.
>
> * * * * *
>
> Based on the preceding facts, I could not have known about the one year filing

> limitation of the AEDPA until I returned to OSP [the Oregon State Penitentiary] on 07/14/1997. At th[at] time, my state post-conviction was active and I could not file a habeas corpus until my state proceedings were exhausted on 10/23/2000. Once my state remedies were exhausted, I filed my habeas corpus petition within the one year limit on 05/14/2001.

(E.R. 17-18). Attached to Kephart's affidavit were materials that included an "inmate communication" dated February 6, 1996, when he was still in a state facility, indicating his desire "to start [his] post-conviction." (E.R. 19).

After counsel was appointed to represent Kephart in the habeas corpus proceeding, his attorney submitted additional materials in support of Kephart's claim of equitable tolling. Among those materials was an affidavit from Noe Martinez, a former inmate who was incarcerated at the Florence, Arizona facility from January 1996 until early October 1997, and who worked as a law library clerk at that facility. (E.R. 155-56). Martinez described inadequacies in the law library, but also asserted that the library "had 28 U.S.C. § 2254, which probably arrived in 1996." (E.R. 156). The library also contained "some edition of *Liebman*'s book on habeas corpus." (E.R. 156). At some point, some information was posted "about the federal one-year statute of limitations * * * regarding habeas corpus petitions." (E.R. 157). Martinez "had some contact with inmate Kephart in the library," but Martinez did not remember any specifics. (E.R. 158).

Another inmate remembered Kephart from the Arizona facility. His recollection was that "Kephart was trying to file his state post conviction and they had nothing in the library to help him." (E.R. 165). This inmate believed that the Arizona prison did not receive section 2254 until shortly before

October 1997. (E.R. 167). He remembered that Kephart "was trying to prepare his state post conviction to file, and he was upset because the library had nothing to help him." (E.R. 167).

In his findings and recommendation, the magistrate judge recommended that the petition seeking relief in habeas corpus be denied and the case dismissed. (E.R. 174). Kephart argued that the time "between the enactment of the AEDPA and the date petitioner filed his post-conviction petition should be equitably tolled because the State of Oregon interfered with his ability to file his post-conviction any sooner by sending him to a private prison in Florence, Arizona which had an inadequate law library." (E.R. 172). But the magistrate judge concluded that "did not prevent [Kephart] from filing his state post-conviction petition." (E.R. 173). Kephart "ha[d] failed to demonstrate that equitable tolling is warranted in this case." (E.R. 173) (citation omitted). "[A]n evidentiary hearing [wa]s not warranted in this case because there is adequate information in the record." (E.R. 173).

On *de novo* review of the findings and recommendation, the district court judge agreed "that equitable tolling is not appropriate." (E.R. 177). Kephart "present[ed] no evidence that he faced such [extraordinary] circumstances." He made "conclusory allegations that he had no access to current Oregon or federal law, and that the library at the corrections facility in Arizona had only three outdated books." (E.R. 177). Kephart did "not indicate that he asked library personnel or assistance [*sic*] for help, or that when he asked for assistance none was provided." (E.R. 177). Moreover, Kephart's account was "contradicted by the affidavit of Noe Martinez." (E.R. 177). Martinez stated that 28 U.S.C. § 2254 was available in 1996 and that information about the one-year statute of limitations was posted. (E.R. 178). Furthermore, petitioner did not provide the dates on which he attempted to obtain

information at the Arizona facility. (E.R. 178). It appeared that Kephart "believed his federal § 2254 petition would be timely if filed within one year of the date on which the denial of his post-conviction petition became final. Such belief was not necessarily unreasonable, but it was incorrect." (E.R. 179).

b. Ninth Circuit

On appeal, the Ninth Circuit reversed and remanded for an evidentiary hearing on equitable tolling. *Roy,* 465 F.3d at 975. The court noted that it "has recognized that the AEDPA statute of limitations provisions * * * can be subject to equitable tolling." *Id.* at 969, citing *Calderon v. United States Dist. Court (Beeler),* 128 F.3d 1283, 1288 (9th Cir. 1997), *cert. denied* 522 U.S. 1099 (1998), *overruled on other grounds by Calderon v. United States Dist. Court (Kelly),* 163 F.3d 530 (9th Cir. 1998) (en banc), *cert. denied* 526 U.S. 1060 (1999). In this case, the Ninth Circuit outlined the requirements for equitable tolling, but noted that the court's "precedents do not provide us much guidance regarding what diligence might mean in the AEDPA context." *Id.* at 970 (footnote omitted).

As to both Kephart and Roy, their habeas petitions were timely filed under AEDPA only if the time while they were in Arizona was equitably tolled. *Id.* at 968. Ultimately, as to Kephart (and Roy) the court determined that because they had "filed their habeas petitions *pro se*, allege[d] specific efforts they pursued in order to file habeas petitions, and because both filed their claims within a reasonable period of time after they were transferred back to the Oregon facility and the extraordinary circumstances were removed," the court concluded that they had "presented sufficient evidence of their diligence to warrant an evidentiary hearing." *Id.* It was "highly relevant" that both petitioners "were proceeding *pro se* until appointed counsel by the district court." *Id.* Because

they "were proceeding *pro se,* [the court] construe[d] their allegations regarding diligence liberally." *Id.*

With regard to Kephart, he

> presented evidence of his efforts to file his claim while in Arizona. One of the affidavits in this case indicates that "Kephart was trying to file his state post conviction" claim and thus was present in the law library trying to do research. The fact that Kephart was able to discuss with specificity what precisely was present in the Arizona library also indicates he had visited the library at least on occasion. Kephart stated that the Arizona library "consisted of only three outdated legal books, which contained no information about the AEDPA."

Id. at 971. Kephart (and Roy) had "done enough to demonstrate that they were not the cause of their tardiness, and that they would have filed on time but for the transfer to Arizona." *Id.* at 973. They were entitled to an evidentiary hearing because of significant conflicts in the affidavits on material issues. *Id.* at 975.[6]

REASONS FOR GRANTING THE WRIT

The central issues in this case are whether equitable tolling is available at all in the AEDPA context and, if equitable tolling is available, how specific a petitioner's habeas pleadings and evidentiary submissions must be in order to obtain an evidentiary hearing on equitable tolling.

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[6] In this petition, the State has not described the affidavits it submitted regarding the legal materials and the assistance that was available to Oregon inmates in the Arizona facility.

With regard to those issues, the Ninth Circuit made at least four significant legal errors that will impact habeas corpus practice in the circuit, that will adversely affect the States in the circuit, and that will lead to many unnecessary and, for the States, time-consuming and expensive evidentiary hearings. The court ignored reality when it chose to treat a long-represented habeas petitioner as though the petitioner still was proceeding *pro se*. It relied on its own earlier decisions in holding that the AEDPA statute of limitations is subject to equitable tolling. It set the bar much too low for obtaining an evidentiary hearing on equitable tolling. And it diluted the diligence requirement of equitable tolling to such a degree as to render the requirement almost meaningless. The Ninth Circuit's decision conflicts with decisions from other circuits, and it will confuse and distort habeas practice in the circuit. This Court's review and guidance is needed.

I. The Ninth Circuit erred in treating a represented habeas petitioner as a *pro se* petitioner; that error could impact habeas cases throughout the circuit.

Curiously, although Kephart was appointed counsel in the habeas proceeding in December 2001 – about seven months after he filed his habeas petition and about two and a half years before the district court judgment was entered – although counsel was allowed to and did submit additional evidentiary materials in support of Kephart's equitable tolling claim, and although the district court considered those additional materials when it decided not to hold an evidentiary hearing and to deny the petition, the Ninth Circuit still treated Kephart's habeas pleadings and evidentiary submissions and as though he was proceeding *pro se*. It was "highly relevant" that Kephart was "proceeding *pro se*" until counsel was appointed. *Roy*, 465 F.3d at 970. Because he was "proceeding *pro se*, [the court] contrue[d] [his] allegations regarding diligence liberally." *Id.*

> [E]ven though *pro se* status alone is not enough to warrant equitable tolling, it informs and colors the lens through which we view the filings, and whether those filings made sufficient allegations of diligence. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) ("This court recognizes that it has a duty to ensure that *pro se* litigators do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements").

Id.

Simply put, it makes no sense and ignores reality to continue to treat a represented habeas petitioner as a *pro se* when the petitioner has long had the assistance of appointed counsel who was able to and did supplement the record. Of course, Kephart was proceeding *pro se* when he filed his habeas petition in this case and when he filed his response to the district court's order to show cause why his petition should not be dismissed as untimely. But petitioner had been represented for about two and a half years when the district court's judgment issued. Nothing prevented his attorney from submitting additional affidavits and other materials regarding the equitable tolling claim; indeed he did so, and the district court considered those materials when it ruled on the claim. In this situation it is anomalous to continue to treat Kephart as though he is proceeding *pro se*.

And the error is one that can significantly and adversely impact habeas corpus practice throughout the Ninth Circuit. It is routine for habeas petitioners to file their initial petition *pro se*, and counsel often is appointed thereafter. Thus, the situation that occurred in this case is a common one. Under the court's once-a-*pro-se*-always-a-*pro-se* approach, habeas petitioners get the best of all possible worlds – the

appointment of counsel along with the lenity afforded the pleadings of *pro se* petitioners – while the States get the worst. While attempting to uphold state court convictions, the States must face opposing counsel, but can never know which pleadings or affidavits the court may treat as *pro se*, even some considerable time after counsel has been appointed. Such an approach can only add a Byzantine layer of confusion and uncertainty to habeas practice in the circuit and lead to anomalous results, such as the one in this case, in which a long-represented petitioner is transmuted back into someone proceeding *pro se*. So far as the State has been able to determine, no other federal court has taken the approach that the Ninth Circuit took in this case. The court's approach conflicts with the one this Court has taken. *See Baldwin Co. Welcome Center v. Brown*, 466 U.S. 147, 150 n. 4 (1984) (rejecting the dissent's suggestion that the Court should have been more solicitous of *pro se* pleadings in a case where the petitioner was represented by counsel when the district court dismissed the case and thereafter).

II. The Ninth Circuit erred in holding that equitable tolling is available to excuse the otherwise untimely filing of a section 2254 habeas petition.

In this case, the Ninth Circuit, relying in part on its earlier en banc decision in *Calderon v. United States Dist. Court (Kelly)*, 163 F.3d at 535, noted that the court "has recognized that the AEDPA statute of limitations provisions violated by Roy and Kephart can be subject to equitable tolling." *Roy*, 465 F.3d at 969. The court erred in holding that equitable tolling is available in the AEDPA context to excuse the filing of otherwise untimely petitions.[7]

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[7] Admittedly, petitioner did not raise this claim below. But to do so would have been futile. The Ninth Circuit repeatedly

This Court has "never squarely addressed the question whether equitable tolling is applicable to AEDPA's statute of limitations." *Pace v. DiGuglielmo,* 544 U.S. 408, at 418 n. 8 (2005). In *Pace,* the Court merely "assume[d] without deciding its application for purposes of th[at] case." *Id. Cf. Duncan v. Walker,* 533 U.S. 167, 182-84 (2001) (Stevens, J., concurring, in part, joined by Souter, J.) (nothing in that case, "nor anything in the text or legislative history of AEDPA, precludes a federal court from deeming the limitations period tolled for such a petition as a matter of equity").

Concededly, most courts that have considered the issue have ruled that the one-year limitations period in §§ 2244 and 2255 is subject to equitable tolling. *See Williams v. Sims,* 390 F.3d 958, 962 (7th Cir. 2004) (collecting cases). Those decisions, however, have not given sufficient attention to the statutory text of those provisions and to the fact that, in section 2244 in particular, Congress explicitly prescribed the circumstances in which the one-year limitations period can be extended or tolled. Opinions that have reached or have suggested the opposite conclusion – and that have determined that equitable tolling is not or may not be available at all in the AEDPA context – have given more attention to the statutory text. *See Solomon v. United States*, 467 F.3d 928, 936 (6th Cir. 2006) (Griffin, J., dissenting) (emphasizing the paramount significance of the statutory text, and indicating that the detailed and specific text of section 2255 does not suggest any Congressional intent to allow for equitable tolling); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (given the express tolling provisions of 28 U.S.C. § 2244(d), "it is unclear what room remains for importing the judge-made doctrine of equitable tolling"); *David v. Hall,* 318 F.3d

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has embraced the concept of equitable tolling in the AEDPA setting, including in its en banc decision in *Kelly*.

343, 346 (1st Cir.), *cert. denied* 540 U.S. 815 (2003) (noting that section 2244(d) defines the one-year limitations period "in detail" and that it "adopt[s] very specific exceptions;" "Congress likely did not conceive that the court would add new exceptions and it is even more doubtful that it would have approved of such an effort;" "AEDPA reflects Congress' view that the courts were being too generous with habeas relief and that the whole system needed to be tightened up;" but assuming *arguendo* that equitable tolling can be available) (citations omitted); *United States v. Pollard*, 161 F. Supp. 2d 1, 12 (D DC 2001) ("The intent of Congress to prevent equitable tolling is indicated by the specific provisions in § 2255 to control the statute of limitations"); *Giles v. United States*, 6 F. Supp. 2d 648, 650 (ED Mich 1998) ("The detail of § 2255 and its direct and express determination of when the time limit begins indicates that Congress did not intend to permit courts to read other unmentioned and open-ended equitable exceptions into the statute") (citation omitted). This Court should grant certiorari to resolve the conflicting views about whether equitable tolling is available under the AEDPA to excuse the otherwise untimely filing of habeas petitions. That issue is extremely important to States, to habeas petitioners, and to the lower federal courts.

This Court also should review this issue because the decision of the Ninth Circuit (and of the other courts that have held that equitable tolling is available in this context) appear to be in tension with recent decisions of this Court holding that equitable tolling is not available when Congress has crafted a plain, specific, and detailed statute of limitations. In *United States v. Brockamp*, 519 U.S. 347 (1997), this Court unanimously rejected the invitation to rewrite "for nonstatutory equitable reasons" a statute of limitations enacted by Congress for the filing of tax returns. The Court held that the statute's detail and its "explicit listing of

exceptions" indicated that "Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote." *Brockamp,* 519 U.S. at 352. Similarly, a year later in *United States v. Beggerly*, 524 U.S. 38, 48 (1998), this Court reiterated that "[e]quitable tolling is not permissible when it is inconsistent with the text of the relevant statute." That teaching appears to have been largely forgotten when the issue has been whether equitable tolling is consistent with the text of the AEDPA. *But see Solomon,* 467 F.3d at 937-39 (Griffin, J., dissenting, relying on the Court's decisions in *Brockamp* and *Beggerly* to conclude that equitable tolling should not be available under section 2255).

III. Assuming that equitable tolling is available, the Ninth Circuit set the bar for obtaining an evidentiary hearing far too low; its approach conflicts with that of other circuits.

Based on the most conclusory of allegations, the Ninth Circuit held that Kephart is entitled to an evidentiary hearing on his claim of equitable tolling, and specifically on his claim that he diligently pursued his rights while incarcerated in Arizona. It is enough, the court determined, that Kephart stated that he was trying to file a state post-conviction petition and "thus was present in the law library trying to do research." *Roy,* 465 F.3d at 971. That he was able to describe the materials that were in the Arizona law library "also indicates he had visited the library at least on occasion." *Id.*

If that is a showing of diligence sufficient to warrant an evidentiary hearing, virtually any prisoner advancing an equitable tolling claim, who makes the most minimal showing, will be entitled to an evidentiary hearing. Such a result will waste district court time, and subject the States in the circuit to many unnecessary evidentiary hearings.

The Ninth Circuit's approach also is at odds with that adopted by other circuits. The Eleventh Circuit has held that an evidentiary hearing need not be held on a claim of equitable tolling "'when [a habeas petitioner's] claims are merely conclusory allegations unsupported by specifics.'" *Pugh v. Smith*, 465 F.3d 1295 (11th Cir. 2006), quoting *Drew v. Dep't of Corrections*, 297 F.3d 1278, 1293 n. 7 (11th Cir. 2002), *cert. denied* 537 U.S. 1237 (2003), in turn quoting *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991), *cert. denied* 502 U.S. 1105 (1992). *See also Drew*, 297 F.3d at 1293 ("In light of the wholly conclusory nature of Drew's recently-presented allegations and in the absence of supporting evidence, the district court did not abuse its discretion in deciding not to hold a hearing"). Similarly, the Seventh Circuit has stated that an evidentiary hearing is not required "when a petitioner's allegations are 'vague, conclusory, or palpably incredible rather than detailed and specific.'" *Kato v. United States*, 467 F.3d 1063, 2006 U.S. App. LEXIS 27262, **8 (7th Cir. 2006), quoting *Bruce v. United States*, 256 F.3d 592, 597 (7th Cir. 2001) (internal citations and internal quotation marks omitted in *Kato*).[8]

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[8] In addition to disagreeing about the standard that applies when deciding whether to grant an evidentiary hearing, the courts of appeals disagree about the standard of review that applies to such a decision. *See, e.g., Rouse v. Lee*, 339 F.3d 238, 247 & n. 7-9 (4th Cir. 2003) (en banc), *cert. denied* 541 U.S. 905 (2004) ("The other circuits are divided on the proper standard of review, with some applying abuse of discretion and others applying de novo review. Several circuits provide for de novo review in certain circumstances, and abuse of discretion review in all other circumstances") (footnotes omitted). In this case, the Ninth Circuit purported to apply an abuse of discretion standard, *Roy*, 465 F.3d at 968, although it

The Ninth Circuit's approach in this case stands in stark contrast to the approach of the Eleventh and Seventh Circuits. It is difficult to envision a claim much more conclusory than Kephart's. From his submissions the reader knows only that he asserts he was in the prison law library on occasion and that there wasn't much in the library. There is nothing to show he was attempting to pursue federal habeas, asked about federal materials, or otherwise attempted to learn about the requirements of federal law.

In addition to the direct conflict with the Eleventh and Seventh Circuits, the Ninth Circuit's ready willingness to order an evidentiary hearing based on mere conclusory allegations conflicts with the case law of other circuits as well. In *LaCava v. Kyler,* 398 F.3d 271, 277 (3rd Cir 2005), the court indicated that an evidentiary hearing on equitable tolling is not warranted if the petitioner fails to show that he exercised reasonable diligence in attempting to file a timely petition. *See also Robinson v. Johnson,* 313 F.3d 128, 142 (3rd Cir. 2002), *cert. denied.*540 U.S. 826 (2003) (evidentiary hearing need not be held in every case in which the petitioner claims he was deprived of access to his legal materials; no hearing required when the deprivation was relatively brief, petitioner said he needed the materials for state court filings, and ultimately he filed federal habeas without them).[9]

In contrast, Kephart has not shown that he was diligent. Indeed, he has come nowhere near such a showing. The

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is difficult to discern any appellate court deference to the district court's exercise of discretion.

[9] Kephart appears to have visited the law library because he was working on his state post-conviction petition, which he filed while still incarcerated in Arizona.

Second Circuit also has noted that, even when a habeas petitioner's allegations are adequate to survive a motion to dismiss, an evidentiary hearing is not the inevitable result; instead, the record may be supplemented. *Valverde v. Stinson*, 224 F.3d 129, 135 (2nd Cir. 2000). As discussed above, Kephart, while represented by counsel, already has had an adequate opportunity to supplement the record, and his attorney submitted additional affidavits.

In sum, the Ninth Circuit has set the bar that must be cleared to gain an evidentiary hearing almost at ground level. The most conclusory of allegations, that do not show reasonable diligence, will suffice. That approach conflicts with those employed in other circuits, which will not order an evidentiary hearing based on conclusory allegations and demand more from a habeas petitioner. The Ninth Circuit's approach will waste considerable trial court time and consume scare judicial resources. It will force the States of the circuit into unnecessary evidentiary hearings in many cases. The availability of an evidentiary hearing on equitable tolling should not vary widely from circuit to circuit. To ensure some uniformity of federal practice, this Court's intervention and guidance is needed.

IV. The Ninth Circuit diluted the diligence component of an equitable tolling claim; its approach conflicts with that of other circuits.

This Court has held that, "[g]enerally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. " *Pace v. DiGuglielmo*, 544 U.S. at 418, citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990).[10] In

[10] As noted above, in *Pace* this Court assumed that equitable tolling applied. 544 U.S. at 418 n. 8.

this case, the Ninth Circuit held that Kephart was entitled to an evidentiary hearing because he had made an adequate showing of both his diligence and of extraordinary circumstances. At least for present purposes, the State does not challenge the court's decision about the existence of extraordinary circumstances. The court's ruling as to diligence, however, so reduces that requirement that it becomes almost meaningless. The Ninth Circuit's threshold is set much lower than that set by other courts of appeals.

As discussed above, the Ninth Circuit held that the district court abused its discretion in denying Kephart an evidentiary hearing on equitable tolling, and specifically on the issue of his diligence, based on the sketchiest of showings. According to the Ninth Circuit, Kephart provided enough evidence of his diligence by stating that he was trying to file a state post-conviction petition while incarcerated in Arizona, and "thus was present in the law library trying to do research." *Roy,* 465 F.3d at 971. In addition, the fact that he "was able to discuss with specificity what precisely was present in the Arizona law library * * indicates that he had visited the library at least on occasion." *Id.* Kephart asserted that the law library had only three outdated legal books, none of which contained any information about the AEDPA. *Id.*

If that meager showing is enough to obtain an evidentiary hearing on diligence, diligence equates to something approaching passivity. If diligence can amount to visiting the law library on occasion, knowing what is in it, and trying to do research (for a state court case), diligence amounts to very little. Kephart's allegations and his later submissions do not show that he wanted to know what the AEDPA time limit was, that he asked anyone for information about that time limit or about AEDPA generally, that he visited the law library more than "on occasion," or what he did there. That is

not a showing of diligence.[11] The Ninth Circuit noted that, before its decision in this case, that court's "precedents [did] not provide * * * much guidance regarding what diligence might mean in the AEDPA context." *Id.* at 970 (footnote omitted). But Ninth Circuit precedent now provides that guidance, and the "guidance" points in the wrong direction. Diligence has been converted into minimally tepid effort. That approach conflicts with the more demanding standard set by other courts of appeals.

In cases involving claims of inadequate prison law libraries or lack of access to legal materials, other federal appellate courts have required much more of a showing of diligence than the Ninth Circuit accepted here. In *Arthur v. Allen,* 452 F.3d 1234, *modified* 459 F.3d 1310 (11th Cir. 2006), *pet. cert. pending,* the prisoner claimed that inadequacies in the prison law library had prevented him from filing and entitled him to equitable tolling. The court rejected the claim, holding that,

> To show diligence, a petitioner claiming deficiencies in the prison law library must provide details of the specific actions taken toward filing the petition. *Helton* [*v. Secretary for the Dep't. of Corr.*], 259 F.3d [1310,] at 1314 [(11th Cir. 2000)]. He must show "when

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[11] Because Kephart's allegations also do not show that the absence of AEDPA materials prevented him from filing a federal habeas claim earlier, he also has failed to show any causal relationship between the lack of AEDPA materials and his failure to file within the AEDPA time limit. The focus of the State's briefing in this case has been on diligence, however, not on lack of causation, and this petition will retain that focus.

> he found out about the library's alleged deficiency," must "state any independent efforts he made to determine when the relevant limitations period began to run," and must demonstrate how the prison "thwarted his efforts." *Id.*

Arthur v. Allen, 452 F.3d at 1253. *See also Helton v. Secretary for the Dep't. of Corr.*, 259 F.3d 1310, 1314 (11th Cir. 2000), *rehrg denied* 275 F.3d 49 (2001), *cert. denied* 535 U.S. 1080 (2002) (petitioner's "declaration lacks the necessary specificity to show when he found out about the library's alleged deficiency and what – if anything – he did to remedy the defect;" petitioner never asserts that he asked for the amendments to the federal habeas corpus statutes, or that he made any independent efforts to determine the limitations period).

The Tenth Circuit used a similar approach in *Miller v. Marr*, 141 F.3d 976 (10th Cir.), *cert. den.* 525 U.S. 891 (1998). In that case, as in this one, the petitioner had been transferred from a state institution to a private institution out of state. He claimed that due to inadequacies in the law library at the privately-run facility he did not learn of the AEDPA time limitation until he returned to the state-run prison. *Miller*, 141 F.3d at 978. The court rejected the petitioner's equitable tolling claim because he

> has provided no specificity regarding the alleged lack of access and the steps he took to diligently pursue his federal claims. *Cf. Lewis v. Casey*, 518 U.S. 343 (1996). It is not enough to say that the Minnesota facility lacked all relevant statutes and case law or that the procedure to request specific materials was inadequate.

Id.[12]

In *Felder v. Johnson,* 204 F.3d 168 (5th Cir.), *cert. den.* 531 U.S. 1035 (2000), the court took a much more categorical approach than the one used by the Tenth and Eleventh Circuits. In *Felder,* the petitioner claimed that deficiencies in the prison law library meant that he was not aware of the AEDPA time limitation. 204 F.3d at 169 & n. 1. The court held that such a claim could not warrant equitable tolling because "mere ignorance of the law or lack of knowledge of filing deadlines does not justify equitable tolling or other exceptions to a law's requirements." *Id.* at 172 (numerous citations omitted).[13]

Thus, the case law shows that federal appellate courts take at least three disparate approaches to claims of equitable tolling in federal habeas corpus that are based on allegations of inadequacies in prison law libraries and lack of access to legal materials. Specifically with regard to the showing of diligence that is required for such a claim, the three approaches are: (1) the Ninth Circuit's approach that equates

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[12] In *Miller,* the court also noted that the claimed inadequacies in the law library did not explain the petitioner's "lack of pursuit of his federal claims" earlier, before his transfer. *Id.* Similarly, Kephart's claims do not explain why he waited months to file his federal petition after he returned to Oregon.

[13] The *Felder* court also suggested that a court "should not toll unless the circumstances presented in a particular case are on a par with the conditions listed in [28 U.S.C.] § 2244(d). None of Felder's circumstances, and particularly not his ignorance of the law, can be said to be on a par with those conditions." *Id.* at 172-73.

minimal effort with diligence; (2) the approach used by the Tenth and Eleventh Circuits, that requires more effort and more specificity about the extent of that effort; and (3) the Fifth Circuit's approach that treats claims of inadequacies in a law library as claims based on ignorance of the law, and rejects them on that basis.[14] Those approaches are inconsistent and irreconcilable. Their existence subjects States (and federal habeas petitioners) to conflicting outcomes depending on the happenstance of which circuit has jurisdiction over a federal habeas case. Such a patchwork result should not be tolerated in an area of the law as significant, and as frequently litigated, as federal habeas corpus. This Court should accept certiorari and resolve this conflict among the circuits.

CONCLUSION

For the reasons discussed above, petitioner respectfully requests that this Court grant the petition for certiorari and reverse the decision of the court below.

Respectfully submitted,

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[14] Admittedly, and perhaps inconsistently, the Fifth Circuit will consider such claims under the rubric of statutory tolling, at least in some circumstances. *Egerton v. Cockrell*, 334 F.3d 433, 437 (5th Cir. 2003).